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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

No. 3749

BRIEF FOR APPELLANTS.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

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A. Statement of the Case.

1. THE FACTS.

There is no material dispute as to the facts, the following statement being made up of quotations from the opinions of the court below, corrected and supplemental in minor matters.

On October 21, 1920, Pacific Motorship Company owned the motorship "Benowa", the respondent herein, together with three other similar boats, the "Babinda", the "Balcatta" and the "Boobyalla", subject to mortgages of $344,000 on each vessel in favor of the Australian Government (apostles, p. 309).

On that day Pacific Motorship Company made a contract with the Australian Government (apostles, pp. 329-347) under which a new corporation was to acquire these boats and four others, the "Cethana", "Challamba", "Coolcha" and "Culburra", and certain other property, the existing mortgages were to be released and $1,625,000 in bonds secured by a new mortgage were to be issued to the Australian Government. As provided in this contract, the "Benowa" was immediately conveyed to Anglo-California Trust Company, the substituted claimant, and one of the appellants, as trustee (apostles, pp. 510-517).

> "The libelants on January 21, 1921, signed articles with the master of the Steamship "Benowa" at the Port of Baltimore to ship on a voyage from the Port of Baltimore via one or more coastwise ports to one or more ports on west coast of the United States, and final port of discharge on west coast of the United States, for a period not exceeding three calendar months, 'and if crew is discharged on the west coast, transportation will be paid back to Port of Baltimore, Maryland'." (apostles, p. 222.)

January 24, 1921, Houlder, Weir & Boyd, Inc., the New York agents of Pacific Motorship Company, made a contract with the Navy Department for the vessel to

carry coal from Hampton Roads, Va., to Bremerton, Wash. (apostles, p. 465).

In February, Pacific Motorship Company became hopelessly insolvent (apostles, p. 200).

> "The vessel arrived in San Francisco February 28th" (apostles, p. 222).

She put in here in distress, and negotiations were opened with the Navy Department for permission to deliver the cargo at San Francisco (apostles, pp. 492-493).

While these negotiations were pending, on March 8, 1921, the Australian Government commenced a suit in the District Court for the foreclosure of the equitable lien created by the contract of October 21, 1920, asking for a receiver of the various vessels, etc. (apostles, pp. 303-347).

March 9, 1921, permission was granted by the Navy Department to discharge the cargo here (apostles, pp. 497-499).

March 10, 1921, a libel was filed in the District Court by McIntosh and Seymour Corporation against the "Benowa", under which the marshal seized the vessel; intervening libels were filed by various proctors representing other lien holders (apostles, pp. 269-284). Other independent libels were also filed against this vessel and others of the vessels named, and *in personam* against Pacific Motorship Company (apostles, pp. 255-299).

Meanwhile the application for the appointment of a receiver was argued and continued from time to time (apostles, p. 300).

"The libel was filed on March 15th" (apostles, p. 223).

The libel demanded *wages* "to the date hereof", *money* "to procure a passage back to Baltimore", *support* "until they can secure such passage" and *subsistence* "on their way home" (apostles, p. 15), and also the *penalty* provided by R. S. 4529 "for each of the days said wages remain unpaid from and after the 15th day of March, 1921" (apostles, p. 15). The schedule annexed to the libel shows the amounts claimed by libelants to be due as wages up to March 15th, that claimed by Spencer being $623.85, and the total being $10,395.83 (apostles, p. 18). On the following day, libelants' proctor, on their behalf, sent a telegram to the Navy Department, demanding that it withhold $10,395.83 out of the freight for libelants (apostles, p. 479). At the same time he sent a similar letter to the naval commander here (apostles, pp. 477-478).

The vessel "was discharged March 17th" (apostles, p. 222).

On the same day Pacific Motorship Company assigned to libelants' proctor, as trustee, $12,000 to meet the claims of libelants (apostles, pp. 204-205) and telegraphed to Washington directions to pay this sum to libelants' proctor (apostles, pp. 476-477), who at the same time telegraphed his acceptance of the assign-

ment, and a release of the demand wired the Navy Department the day before (apostles, p. 476).

> "The receiver was appointed on the 26th day of March for eleven motorships, including the "Benowa", and for the interests of the defendants in thirteen other ships. The receiver qualified on the 28th." (apostles, pp. 222-223.)

This is manifestly a typographical error. There were only seven motorships, and eight other ships (apostles, p. 348).

Presumably at about the same time the freight money was paid by the Navy Department to Houlder, Weir & Boyd, Inc. (apostles, p. 449), in whose hands it was attached in a suit of Pacific Steam Navigation Company v. Pacific Motorship Company (apostles, pp. 103; 508).

Shortly before April 27, 1921, W. E. Gerber, Jr., the substituted intervening libelant and the other appellant, entered into negotiations for the purchase of the claim of the Australian Government, the first assurance that it would be possible being received on April 27 (apostles, pp. 208-209).

> "On the 27th of April, 1921, the parties hereto and Messrs. Thacher & Wright, appearing for McIntosh-Seymons Corporation, Henry C. Peterson, Inc., and E. C. Generlux appeared before the court, and such proceedings were had that an order was entered referred this cause to Francis Krull, United States Commissioner, to take the testimony and report findings and conclusions" (apostles, p. 225).

> "On the 27th day of April the following tender in writing was filed in this proceeding:

'Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars ($5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is herewith deposited with the clerk of this court.

'Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.

'Said William E. Gerber, Jr., likewise offers to furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles.' '' (Apostles, p. 225.)

At the same time Gerber deposited $5,609.20 in the registry (apostles, p. 7).

Up to this time there had been no funds available to Pacific Motorship Company or to the receiver for the payment of the libelants, the only possible source being the freight money, which, as above explained, was never realized (apostles, pp. 94, 103, 200). On May 30, Gerber closed his negotiations with the Australian Government (apostles, p. 208).

''Testimony was thereafter taken and returned into this court.'' (Apostles, p. 225.)

''On or about May 5, 1921, the ''Benowa'' was released from the receivership. On May 10th Gerber was substituted as intervenor in place and stead of the Commonwealth of Australia.'' (Apostles, p. 225.)

''On the 14th of May, 1921, a decision was filed'' (apostles, p. 226).

Notwithstanding the rules of this court, and the *praecipe* herein (apostles, p. 3), the clerk has omitted this decision. For the information of the court we print it as an appendix hereto.

The effect of this decision is expressed in the following summary:

> "An Admiralty Court applies the principles of equity in so far as it may be done, and in this case I think the seamen are entitled to the full amount of their unpaid wage to and including the 17th of March, and to the further sum equal to one day's pay for each and every day from said date until the entry of this decree, and for the amount of the provisions actually necessary and secured for their maintenance upon the vessel, and also for transportation together with subsistence en route for all such as desire to return to the home port." (Appendix, p. vi.)

> "On the 16th day of May, upon the suggestion of Thacher & Wright, the matter was reassigned for argument on the 17th of May, at which time appeared Ira S. Lillick, Esq., and Arthur Olson, Esq., appearing for Libelants, and Felix Smith, Esq., representing Messrs. Pillsbury, Madison & Sutro, for Respondent and Substituted Intervening Libelant, W. E. Gerber, Jr., and Messrs. Thacher & Wright appearing for McIntosh- Seymons Corporation, Henry C. Peterson, Inc., and E. C. Genereux" (apostles, p. 226).

The supplemental decision filed May 17, 1921, eliminates the part of the original decision awarding libelants "the amount of the provisions actually necessary and secured for their maintenance upon the vessel".

On the day this opinion was filed, it was agreed between counsel and Judge Neterer "that no penalty

should be imposed for any delay subsequent to'' that day (apostles, p. 239).

The interlocutory decree entered May 25, 1921 (apostles, pp. 231-233), fixed specific amounts due libelants as wages up to March 17, 1921, the amount so awarded Spencer being $404.85, and the total of these amounts being $5,551.07.

Before the final decree was entered, two of libelants, Crawford and Hughes, accepted the amounts deposited to their credit in the registry by Gerber, and transportation from San Francisco to their homes, so that in their case the final decree, entered June 2, 1921 (apostles, pp. 251-254), is merely for the penalty. As to the other libelants, it covers wages, penalty and an anomalous provision for transportation. The total amount of wages and penalty in the final decree is $20,919.67, of which $16,198.88 is penalty. Spencer is awarded $1310.00, of which $404.85 is for wages and $905.24 is for penalty.

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2. THE QUESTIONS INVOLVED.

The questions involved relate:

First—To the penalty;

Second—To the provision for transportation;

Third—To the condition in which it was at the time of the entry of the decree in this cause.

First—As to the penalty, it is our position that:

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the

date of the tender to libelants, under which more was actually deposited in the registry than was subsequently awarded to libelants as wages.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

III. No penalty at all should be imposed in this case for the reason that

(*a*) There was sufficient cause for the delay in the payment of wages, in that

(1) The financial condition of Pacific Motorship Company made the payment impossible.

(2) The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.

(3) The acceptance by libelants of the assignment of the freight money made it unnecessary for Pacific Motorship Company to attempt to pay libelants from some other source.

(*b*) There is no allegation that the delay in payment was without sufficient cause.

(*c*) The effect of the decree is to penalize not the owners of the vessel, but those having liens upon her.

IV. The amount of the penalty is computed wrongly.

Second—As to the provision for transportation, we insist that libelants should have accepted the transpor-

tation offered by Gerber, and not recovered money in lieu thereof.

Third—As to the condition of this case at the time of the entry of the decree, we point out that it was improper to enter a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels under which the vessel is held by the marshal, and without notice to these libelants and intervening libelants.

B. Specification of the Errors Relied Upon.

I.

That the District Court erred in rendering and entering the interlocutory decree herein, dated May 25, 1921 (*supra,* pp. 8-10).

II.

That the District Court erred in rendering and entering the final decree herein, dated June 2, 1921 *(supra,* pp. 8-10).

III.

That the District Court erred in not dismissing the libel herein with costs to claimant, as prayed for in claimant's answer, and in not granting to claimant a decree of dismissal herein with its costs as so prayed for (*supra,* pp. 8-10).

IV.

That the District Court erred in rendering and entering any decree herein, because the motorship "Benowa"

was never seized under process issued herein *(infra,* pp. 49-54).

V.

That the District Court erred in rendering and entering any decree herein, because at the time of the filing of the libel herein the motorship "Benowa" was, ever since has been and now is under seizure and in the possession of the Marshal of the District Court under process issued in the cause now pending in the District Court entitled "McIntosh & Seymour Corporation, a corporation, Libelant, v. American Motorship 'Benowa', her engines, tackle, apparel and furniture. etc., Respondent, No. 17116" (*infra,* pp. 49-56).

VI.

That the District Court erred in rendering and entering any decree herein, because at the time of the filing of the libel herein there were pending against the said motorship "Benowa" other libels, which said libels ever since have been and now are pending in said District Court (*infra,* pp. 49-56).

VII.

That the District Court erred in rendering and entering any decree herein, without consolidating this cause with numerous other libels against the motorship "Benowa" pending in said District Court at the time of the entry of said decree and now pending therein (*infra,* pp. 49-56).

VIII.

That the District Court erred in rendering and entering any decree herein, because the above entitled cause

was not at issue at the time of the entry of said decree and is not yet at issue (*infra,* pp. 49-56).

IX.

That the District Court erred in rendering and entering any decree herein, because said libels against said motorship "Benowa", filed prior to the filing of this libel, were not at issue at the time of the entry of said decree, and are not yet at issue (*infra,* pp. 49-56).

X.

That the District Court erred in rendering and entering any decree herein without having notified the parties to said prior libels of the hearing of this cause, or of the intention to render or enter any decree herein (*infra,* pp. 49-56).

XIII.

That the District Court erred in holding, deciding and decreeing that libelants were entitled to recover any sum whatever out of the motorship "Benowa", her engines, boilers, machinery, tackle, apparel and furniture (*supra,* pp. 8-10).

XIV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 17, 1921 (*infra,* pp. 17-47).

XV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 26, 1921 (*infra,* pp. 20-30).

XVI.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to April 27, 1921 (*infra,* pp. 17-20).

XVIII.

That the District Court erred in holding and deciding that on the arrival of the vessel that the receiver did nothing for the physical care of the ship or for supplying any provisions (*infra,* pp. 23-25).

XXI.

That the District Court erred in holding and deciding that subsequent to March 17, 1921, the master and crew discharged the routine duties of the vessel which was lying at anchor (*infra,* p. 24).

XXII.

That the District Court erred in holding and deciding that no provisions were furnished (*infra,* p. 24).

XXV.

That the District Court erred in holding and deciding that the receiver, in his testimony as to what he did, made the statement set forth in said decision (*infra,* pp. 24-25).

XXVI.

That the District Court erred in holding and deciding that the contention that the libelants were not entitled to the statutory penalty after March 17, 1921, is not well founded (*infra,* pp. 17-47).

XXVIII.

That the District Court erred in holding and deciding that the contention that the penalty is a personam liability and may not be impressed as a preferred lien with the wages, is out of harmony with the plain sense of the statute (*infra,* pp. 44-46).

XXIX.

That the District Court erred in holding and deciding that the penalty is in effect an increase of wages (*infra,* pp. 31-32).

XXX.

That the District Court erred in holding and deciding that there is an agreement in this case as to the amount due for wages (*infra,* pp. 37-39).

XXXI.

That the District Court erred in holding and deciding that the only contention is that the inability of the claimant to pay because of lack of funds is sufficient cause to avoid the penalty (*infra,* pp. 17-20, 37-47).

XXXII.

That the District Court erred in holding and deciding that the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations (*infra,* p. 34).

XXXV.

That the District Court erred in holding and deciding that the seamen are entitled to the further sum

equal to one day's pay from the 17th day of March, 1921, for each and every day until the entry of the decree herein (*infra,* pp. 17-47).

XXXVI.

That the District Court erred in holding and deciding that the seamen are entitled for the amount of the provisions actually necessary and secured for their maintenance upon the vessel (*infra,* p. 24).

XXXVII.

That the District Court erred in holding and deciding that the purpose of the statute is that a seaman should be protected against enforced idleness and nonsubsistence by being required to wait for payment of his wages when he is without fault and no sufficient cause exists other than the financial inability of the ship (*infra,* pp. 33-37).

XXXVIII.

That the District Court erred in holding and deciding that the fact that a receiver was appointed for the claimant cannot shift the burden for nonpayment from the ship to the wage earner (*infra,* pp. 20-30).

XXXIX.

That the District Court erred in not holding and deciding that there was sufficient cause for the delay in the payment of the wages of libelants (*infra,* pp. 17-47).

XL.

That the District Court erred in not holding and deciding that the excessive claims made by libelants was

sufficient cause for delay in payment of their wages (*infra,* pp. 37-39).

XLII.

That the District Court erred in not holding and deciding that the assignment of the freight to libelants' proctor, made by claimant, was sufficient cause for delay in the payment of libelants' wages (*infra,* pp. 39-42).

XLIII.

That the District Court erred in not holding and deciding that the financial condition of Pacific Motorship Company was sufficient cause for the delay in the payment of libelants' wages (*infra,* pp. 30-37).

XLIV.

That the District Court erred in not holding and deciding that the pendency of the receivership proceedings and the appointment of a receiver therein was sufficient cause for the delay in the payment of libelants' wages (*infra,* pp. 20-30).

XLV.

That the District Court erred in not holding and deciding that the tender made by the substituted intervening libelant, April 27, 1921, and the payment into court on the following day was equivalent to the payment of libelants' wages (*infra,* pp. 17-20).

XLVI.

That the District Court erred in not requiring libelants to look entirely to the sum heretofore deposited in court for their wages (*infra,* pp. 17-20).

XLVII.

That the District Court erred in not requiring libelants to accept their transportation and subsistence en route immediately, or within a reasonable time after the entry of its decree (*infra,* pp. 47-49).

XLVIII.

That the District Court erred in ordering, deciding and decreeing that in lieu of transportation any of libelants should receive cash amounts set forth in said final decree (*infra,* pp. 47-49).

XLIX.

That the District Court erred in ordering, deciding and decreeing that if any of said libelants should have furnished their own transportation and subsistence they should be paid the cash sums mentioned (*infra,* pp. 47-49).

L.

That the District Court erred in ordering that the motorship "Benowa", her engines, tackle, machinery and appurtenances be sold (*infra,* pp. 17-56).

C. Argument.

FIRST. THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants under which more was deposited in the registry than was subsequently awarded to libelants as wages.

As soon as it became apparent that he might have any interest in this case, Gerber tendered libelants

the amount of their wages, as well as he could ascertain this amount, and upon their refusal to accept it, paid it into the registry (apostles, pp. 7; 44-45). The amount so tendered and deposited was $5,609.20, considerably more than $5,551.07, the total of the wages due as ascertained by the District Court (apostles, pp. 232-233).

From April 27 on, then, the delay in payment of the wages was due, not to the refusal of Pacific Motorship Company to pay, but to the refusal of libelants themselves to accept the wages tendered.

It is true that Gerber did not then offer to pay the penalty theretofore accrued and other amounts that libelants then claimed but which the District Court has refused to allow them. But the penalty is imposed by the statute for the refusal to pay *wages,*—not for refusal to meet all the demands which seamen may see fit to make. So long as there is no refusal to pay *wages,* there can be no penalty. Seamen cannot deprive the ship of the right to question such further demands as they may make, by refusing to accept their wages when tendered, and thus imposing a liability for the statutory penalty.

If it were important that there be "sufficient cause" for the refusal to meet these further demands it would be enough to point out that all of the further demands except the penalty from March 17th onward, were disallowed by the District Court, and that the decision of the District Court awarding the penalty was contrary to all cases previously reported (*infra,* pp. 33-34).

Even where there had been a decision of the District Court sustaining the penalty, the Supreme Court of the United States held that there was sufficient cause for further delay not merely in paying the accrued penalty, but also in paying the wages concededly due.

> "It is a very different thing, however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect * * * without sufficient cause'. The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young,* 209 U. S. 123."
>
> *Pacific Mail S. S. Company v. Schmidt,* 241 U. S. 245, 250.

Counsel for libelants, indeed, has expressed the same view. We have already mentioned (*supra,* pp. 7-8) the agreement made on May 17th, that the penalty should cease as of that date. Referring to this agreement, libelants' proctor says:

> "He explains to me that such a suggestion was made by the court with reference only to the possibility of your being willing to consent to the immediate payment to the crew of the amount of the so-called tender made by you some time ago, for, if you were willing to do this, it seemed to the Judge that we should, in our turn, be willing to agree that any such decree as might be entered herein, should be entered *as of* May 17th." (Apostles, p. 240.)

If it was proper that the penalty cease on May 17th, because we were then willing to consent that the money tendered April 27th be paid to the crew immediately, was it not equally proper that the penalty cease to run on April 27th, when the tender was made and refused, —as to which incident counsel says in the same letter:

> "I appreciate the fact that you would like to see the crew paid, and I know that you did express regret that you did not accept the $5609.20 at the time it was tendered." (Apostles, p. 240.)

It is confidently submitted that there can be no conceivable justification for the imposition of any penalty subsequent to April 27, 1921.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

The defendants in the equity suit included Pacific Motorship Company, Anglo California Trust Company, one of the appellants herein, and the holder of the legal title of the "Benowa", and W. L. Comyn & Co., the general agents of Pacific Motorship Company (apostles, p. 303). The application for a receiver in that suit was in no sense collusive but was vigorously contested for ten days (apostles, p. 300).

On March 26, 1921, the District Court made an order appointing Drew Chidester receiver of the "Benowa" and other property. The order also provided:

> "That said receiver be and he is hereby fully authorized and directed to take immediate possession of all and singular the property above described and referred to, wheresoever situated or

found, and to protect the title and possession of the same; also to take possession of and hold subject to the order of this court any and all insurance policies now in effect upon the above described property or any of it, and any and all moneys due, or to become due, under said policies or any of them from the respective insurers named therein; also to take possession of and hold subject to the order of this court any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties, belonging to, or pertaining to, said properties or any thereof.

Each and all and every of the defendants herein and their and each of their agents or employees and each and every of the officers, directors, agents or employees of the corporation defendants herein and all other persons, firms or corporations whatsoever having in their possession or control any of the property hereinabove described are hereby required and commanded forthwith to turn over and deliver to said receiver, or to his duly constituted representative or representatives, each and every of said property hereinabove described, and any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties in their or any of their hands or under the control of them or any of them, belonging to or pertaining to said properties, or any of them, and all and every of such defendants and their and each of their agents and employees and each and every of said officers, directors, agents or employees of the said corporation defendant herein and all such other persons, firms or corporations having in their possession or control any of said properties are enjoined from interfering in any way whatever with the possession or management of any part of the said properties over which said

receiver is hereby appointed or from interfering in any way to prevent the discharge of his duty.

Said receiver is fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the said property, and likewise to defend such actions as may be instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suit now pending in any court involving the title or possession or right to possession of said properties or any of them." (Apostles, pp. 350-352.)

Two days later the receiver qualified (apostles, p. 301). This order effectually prevented any attempt by the defendants to deal with the "Benowa", or any other assets of Pacific Motorship Company so as to raise money for the payment of libelants' claims.

In fact the District Court recognized this, and based its decision imposing the penalty after this date upon the supposed neglect of the receiver. Thus the District Judge said:

"The receiver did nothing for the physical care of the ship or for supplying the same, or for the supplying of any provisions." (Apostles, p. 223.)

And again:

"The receiver in his testimony as to what he did with relation to the 'Benowa' states 'the only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the 'Benowa' was in my hands as receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship.' The notice was dictated and sent out on April 1, 1921. No payment was made or

tendered to the officers or crew nor any arrangement made for their subsistence." (Apostles, p. 224.)

The same statements are found in the original decision (appendix, pp. ii-iv).

In fairness to the receiver it is proper to point out that these statements are contrary to the fact and to the uncontradicted evidence submitted to the District Court.

The receiver did take proper measures "for the physical care of the ship". He selected proper men to take care of her while in port (testimony Chidester, pp. 98-100), and ordered libelants to leave her, as shown in the following letter:

"San Francisco, April 1, 1921.

To the
Members of the Crew
Motorship "Benowa"

This is to advise you that the M/S "Benowa" is now in the hands of a Receiver appointed by the United States District Court, and that your services are not required, and that you are to leave the ship at once.

As a matter of friendly advice and in your interest, I suggest that you seek other employment immediately, pending such arrangements as may hereafter be made in the matter of said recievership looking to the payment of the amounts already due you.

Yours truly,
(Signed) Drew Chidester,
Receiver for
DC/1 Pacific Motorship Company."

(Apostles, pp. 452-453.)

The fact that libelants chose to disregard this order, and to use the vessel as a home (apostles, pp. 143, 161), refusing possession to the receiver's men, does not show any dereliction of duty on the part of the receiver. The men selected by the receiver were sufficient to take care of the vessel (apostles, pp. 98-100; 175; 177-178; 198, 199).

The fact that the receiver did nothing in the way of "supplying any provisions" is quite immaterial, there being no occasion for any provisions. In another case (*The Rupert City,* 213 Fed. 263, 274), the trial judge had held, in accordance with the authorities there cited, that where, as here, the crew had libeled a vessel for wages, there was no obligation on the vessel thereafter to supply provisions. It would seem therefore that his decision in this case is not based upon the alleged failure of the receiver to supply provisions. However this may be, it appears that there were provisions on the "Benowa" (apostles, pp. 63-64; 175-176).

It is true that on cross-examination, the receiver did make the statement quoted in the excerpt from the opinion that appears above. This statement, however, was explained immediately upon re-direct examination (apostles, pp. 102-105). The fact is that on April 12, 1921, he filed in the District Court a report (apostles, pp. 353-368), and on April 23, 1921, he filed two petitions (apostles, pp. 368; 369-375) showing the situation of libelants and the necessity of some action (apostles, pp. 359-360). At no time did the receiver have any funds with which to meet the claims of libelants (apostles,

p. 94), even if it had been proper to make such payment without an order of court. The petitions filed April 23rd were made with a view to obtaining authority to borrow money and pay such claims as were proper; these petitions were to have been heard April 25th, but were continued on account of the imminent dismissal of the equity suit (apostles, pp. 102-103). The claim of the Australian Government upon which the receivership was founded was for $1,625,000. Besides this, there were claims aggregating $500,000 (apostles, pp. 105; 110-111). Obviously it took some time for the receiver to determine the facts in order to present them properly to the court. Under all the circumstances, he cannot be criticised for not having petitioned the court sooner for power to meet the demands of libelants. And since he could not meet these demands without the directions of the court, it must follow that libelants have no cause to complain of their treatment at his hands.

But even if there had been gross malfeasance on the part of the receiver, that could not justify the assessment of this penalty upon the appellants.

The penalty is imposed upon

> "Every *master* or *owner* who refuses or neglects to make payment." (R. S. 4529.)

The receiver was neither master nor owner, but merely an officer of the court. Refusal or neglect on the part of the receiver cannot be imputed to the appellants.

The existence of the receivership tied the hands of the owners of the vessel, so that it cannot be said that

thereafter the owners refused or neglected to pay. The owners are in no way responsible for the acts of the receiver.

> "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg., 355. *He is an officer of the court*; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. *Delany v. Mansfield,* 1 Hog., 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; *Verplanck v. Mercantile Insurance Company,* 2 Paige (N. Y.) 452."
>
> *Booth v. Clark,* 17 How. 322, 331.

> "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in

custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt."

Davis v .Gray, 16 Wall. 203, 217-218.

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it."

Wiswall v. Sampson, 14 How. 52, 65.

"The plaintiff in error held the assets of the bank as the agent and receiver of the Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or *to pay any debts* due from the bank, *except by the order of the court.* He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi."

Peale v. Phipps, 14 How. 368, 374.

"A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his

appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property. *Skip v. Harwood,* 3 Atk. 564; *Anon.* 2 Atk. 15; *Wiswall v. Sampson,* 14 How. 52, 65; *Ellis v. Boston, Hartford & Erie Railroad,* 107 Mass. 1, 28; *Maynard v. Bond,* 67 Missouri, 315; *Herman v. Fisher,* 11 Mo. App. 275, 281."

Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 236.

"The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the court, by him as its officer. *Wiswall v. Sampson,* 14 How. 52, 65; *Heidritter v. Elizabeth Oil Cloth Co.,* 112 U. S. 294, 304; *Chicago Union Bank v. Kansas City Bank,* just decided, ante, 223."

Thompson v. Phenix Ins. Co., 136 U. S. 287, 297.

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall v. Sampson,* 14 How. 52, 65; *Peale v. Phipps,* 14 How. 368, 374; *Booth v. Clark,* 17 How. 322, 331; *Union Bank v. Kansas City Bank,* 136 U. S. 223; *Thompson v. Phenix Ins. Co.,* 136 U. S. 287, 297.

It is for that court in its discretion to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in

other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. *Barton v. Barbour,* 104 U. S. 126; *Texas & Pacific Railway v. Cox,* 145 U. S. 593, 601."

Porter v. Sabin, 149 U. S. 473, 479.

"A receiver is an indifferent person, appointed by a court as a quasi officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court, during the continuance of or in pursuance of the litigation. The appointment of a receiver determines no right. He is a part of the machinery of the court by which equity protects and secures the rights of parties,—all parties in interest. His custody is that of the law. *Booth v. Clark,* 17 How. 322, 15 L. Ed. 164."

Baltimore Bldg. & L. Ass'n v. Alderson, 99 Fed. 489, 494. (C. C. A. 4th Circuit.)

The receiver was appointed by the second division of the District Court. He held his office for the protection and in the interest of libelants just as much as that of any other creditor, including the Australian Government and those filing the other libels and intervening libels on the "Benowa". No suggestion has been made in the suit in which he was appointed, or in any proceeding in the Second Division that he has been derelict in any way. The First Division of the same

court, however, by the decree here under review, has assumed to determine that the receiver neglected his duties and has penalized, not the receiver, but appellants and the other innocent creditors of the "Benowa".

It is submitted that the portion of the penalty covering the period subsequent to the appointment of the receiver cannot be sustained.

III. No penalty at all should be imposed:

(a) There was Sufficient Cause for the Delay in the Payment of the Wages.

(1) *The financial condition of Pacific Motorship Company made the payment impossible.*

The cargo was discharged March 17th. Under the Statute (R. S. 4529) the wages were due the following day, March 18th. The conditions on that date, therefore, govern.

The court will take judicial cognizance of the financial difficulties in which the business of this country and the whole world were involved for the period commencing with December 1920, and of the fact that the consequent depression has been felt most seriously in the shipping business. Along with many other such concerns, Pacific Motorship Company had found itself unable to meet its obligations.

Its only assets had been its interest in these eight motorships, on which the Australian Government had a claim of $1,625,000 (apostles, pp. 315-316; 110; 210).

With falling freights and values, and other claims piling up against the vessels, it had become apparent

that the Company could not succeed, and it was impossible to obtain any money to finance the vessels. For at least a month the Company had been hopelessly insolvent (apostles, pp. 111; 200). The "Benowa" had put into San Francisco in distress (apostles, p. 492) and the "Balcatta" was capsized off the coast of South America (apostles, pp. 201-202, 356-358). The commencement of the receivership proceeding had precipitated suits upon various other claims, the records of the District Court introduced below showing fourteen suits (apostles, pp. 255-299) involving an aggregate of over $150,000, of which three (apostles, pp. 270, 286, 291), involving $12,000 were against the "Benowa" itself. At the same time suit was imminent upon other claims aggregating almost $57,000 including over $3,000 on the "Benowa." All three of the boats in San Francisco were in the hands of the marshal (apostles, pp. 202, 359-363). Finally, before their pay was due, libelants libeled the "Benowa" (apostles, pp. 12-18) and did their best to prevent the payment of the freight (apostles, pp. 479; 477) which was the only source from which the Company could hope to pay their wages (apostles, pp. 94; 204-205). On March 18th, the Company was without funds, and unable to obtain funds (apostles, pp. 200; 204). It was absolutely impossible for the Company to pay the crew.

The provisions of R. S. 4529 relied upon by libelants are undoubtedly penal in their nature.

This was clearly recognized in the opinions of the district judge herein who denominates this a penalty no less than thirteen times.

In this he follows the Supreme Court of the United States whose only decision on the statute mentions it as a penalty on every page of the opinion.

Pacific Mail S. S. Co. v. Schmidt, 241 U. S. 245.

And more recently the Supreme Court of the United States in considering a somewhat similar State statute, less drastic than that here involved, held definitely that it was penal, despite a contrary decision of the State courts.

Missouri Pacific R. R. Co. v. Ault, 41 Sup. Ct. 593.

The effect of the decree of the District Court, then, was to impose a penalty for the failure of Pacific Motorship Company to do something which it was impossible for it to do. If the statute required such a shocking result it would be subject to various constitutional objections; and if there were any doubt as to the construction of the statute, it would have to be construed against the application of the penalty.

> "In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty, unless the words of the statute plainly impose it."
>
> *Tiffany v. National Bank of Missouri,* 18 Wall. 409, 410.

A statute imposed a liability for the debts of a corporation upon its officers, for failure to make an annual report.

> "Defendant contends that the statute * * * is penal and should be strictly construed; in which

proposition the court unhesitatingly concurs. Statutes somewhat similar in character have been passed in several of the States, in all of which States it is held that the statutes are penal, and that for that reason their provisions must *receive a strict construction.*''

Steam Engine Co. v. Hubbard, 101 U. S. 188, 191.

''The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; *if ambiguous,* the court will lean more strongly in favor of the defendant than it would if the statute were remedial.''

Bolles v. Outing Co., 175 U. S. 262, 265.

But our case does not require the resolution of any doubts as to the meaning of ambiguous language in the statute. The statute plainly and clearly limits the penalty to cases where payment has been refused

''without sufficient cause''.

One of the district courts of this circuit has held directly that

''their inability to command the money necessary to pay off the crew is sufficient cause to relieve them from liability under this statute.''

The Gen. McPherson, 100 Fed. 860, 864.

A similar result was reached in the first circuit.

The Wenonah, Fed. Case No. 17,412.

Without noticing these decisions, the District Court held the penalty applicable where

> "No sufficient cause exists *other than the financial inability* of the ship."
>
> (Apostles, p. 228.)

That is, the district judge, in order to justify the result reached by him, has written into the limitation prescribed by Congress

> "without sufficient cause"

an exception not found in the statute itself,

> "other than financial inability."

No authority is cited in support of this interpolation.

In the first of his opinions herein, the district judge recognized that there was no misconduct on the part of the company sufficient to deserve the penalty, and attempted to do equity by reducing the penalty to what he thought would be a fair compromise (Appendix, p. vi). It would seem, therefore, that while he felt that the statute required the imposition of the penalty, he also felt that in the present case the imposition of the penalty was contrary to justice and equity.

In support of his ruling, the district judge said:

> "Clearly the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations." (Apostles, p. 227.)

True enough. But as he also says:

> "Wages are a first and prior charge against the vessel." (Apostles, p. 227.)

and this priority is in itself enough to relieve the wage-earner from any consequences of financial embarrassment of the shipowner.

In the present proceeding libelants cannot possibly recover more than the value of the ship. As long as that value is as much as their proper wage claims, they are adequately protected and need no penalty; and if the value of the ship is less than their wage claims, then nothing is accomplished by giving them a decree for the additional amount of penalty which can never be satisfied.

The penalty is not designed for the protection of seamen from the *financial inability* of the employer, but in order to prevent the employer from taking advantage of them by *arbitrary* or *oppressive* refusal to pay.

It has been said that penalty might be imposed

> "for *vexatious* delay".
>
> *The Amazon,* 144 Fed. 153, 155.

and that the statute was applicable to

> "instances where masters have been known to *wilfully* refuse to pay seamen their wages."
>
> *The Cubadist,* 252 Fed. 658, 662.

> "The statute is a penal statute, intended to punish masters of vessels who, without any just excuse, *arbitrarily* refuse to pay seamen their wages when due."
>
> *The Express,* 129 Fed. 655, 656.

There is no case where the penalty has been imposed upon an employer who, with the best intentions, and entirely innocent of any desire to oppress the crew, finds himself in such straits that he has no money with which to pay them.

As we have seen (*supra,* p. 8), the penalty awarded in this case was more than three times the amount of wages due. While a penalty of this kind is proper where there has been a wilful disregard of seamen's rights, it is manifestly improper where the employer has made every effort to pay the seamen. The law does not punish a man for his misfortunes. That a company has suffered losses, and is in need of money, is no reason for adding to its financial burdens.

In the present case the seamen libeled their ship *before* their wages were due, or even entirely earned. The only sources from which they could be paid were the ship and the freight. They had a prior lien on the ship and could cause it to be sold free of all liens at any time; the company could only dispose of it subject to claims. The freight had been assigned to the crew's proctor (*supra,* p. 4, *infra,* pp. 39-42), and he was in a position to enforce their prior right to it against the attaching general creditor; the company had no answer to the attachment. Libelants, however, avoided having the vessel sold, preferring to use it as a home (*supra,* p. 24; apostles, pp. 143, 161), and allow their claim for the penalty to run up. Nor did their proctor take any steps to collect the freight which had been assigned to him as trustee.

There was nothing Pacific Motorship Company could have done to expedite the payment of libelants. The delay was due to the company's financial condition, and, apparently, also to the choice on the part of libelants and their proctor, to allow the penalty to increase rather than to realize their wages at once. Under these cir-

cumstances, the imposition of a penalty comes as a surprise.

(2) *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

The amount of wages due was $5,551.07 (apostles, pp. 232-233, *supra,* p. 8). Libelants, however, had demanded in their libel wages amounting to $10,395.83 (apostles, p. 18, *supra* p. 4), and their proctor had made similar claims against the freight (apostles, pp. 479; 477, *supra,* p. 4).

The case of Spencer is typical. In the libel he demanded $623.85 as wages. He actually recovered $404.85 as wages.

The libelants persisted in these excessive claims until after the court had decided definitely that they were groundless.

This proceeding was begun in March. In April, Gerber tendered $5609.20, *more* than the wages ultimately found due. Libelants refused to accept it, not only then, but at various later dates. After the decision of the case, indeed, two of the twenty-six members of the crew accepted their wages (apostles, p. 9). A majority accepted their wages June 2nd, the date the final decree was filed (apostles, p. 9). The inference is irresistible that if $5,551.07 had been tendered on March 18th, it would have been refused just as the $5,609.20 was refused the next month.

The delay in paying the crew off, therefore, was due to a controversy as to the amount of wages owing, *in which controversy the employer was in the right.*

The cases are numerous that even where the employer is in the wrong, nevertheless if he disputes the amount due in good faith, this controversy is sufficient cause for refusal to pay until the question is determined by a court.

Pacific Mail Steamship Co. v. Schmidt, 241 U. S. 245;

Franco v. Seas Shipping Corporation, 272 Fed. 542, 543;

The Cubadist, 252 Fed. 658, 662;

The Sentinel, 152 Fed. 564, 566;

The Amazon, 144 Fed. 153, 155;

The Sadie C. Sumner, 142 Fed. 611, 613;

The St. Paul, 133 Fed. 1002;

The Express, 129 Fed. 655;

The George W. Wells, 118 Fed. 761, 762-763;

The Alice B. Phillips, 106 Fed. 956.

The Supreme Court of the United States, indeed, has held that where a shipowner in good faith disputes a part of the seamen's claim, even though the shipowner be in the wrong, this dispute is sufficient cause for a refusal to pay even the amount admittedly due.

Pacific Mail S. S. Co. v. Schmidt, 241 U. S. 245.

To the same effect is the *dictum* in

The George W. Wells, 118 Fed. 761, 763.

In the present case, the employer was in the right; the amount of wages ultimately found to be due was less than the employer's original estimate. The excessive demands of libelants were not only unfounded in fact, but so outrageous that the district judge himself said:

> "There is no ground for controversy with respect to the wages which were earned and which were due."
>
> (Apostles, p. 226.)

The employer's tender of more than the amount due was repeatedly refused by libelants, and was only accepted by them when it was clear that the district court would not award them any more. It is respectfully submitted that, on the authorities cited, the controversy as to the amount of wages due was sufficient cause for the delay.

(3) *The acceptance by libelants of the assignment of the freight money made it unnecessary for Pacific Motorship Company to attempt to pay libelants from some other source.*

The amount of wages due was $5,551.07 (apostles, pp. 232-233, *supra,* p. 8) which became due March 18, 1921 (*supra,* p. 30). On the preceding day Pacific Motorship Company had assigned to libelants' proctor and the latter had accepted as trustee $12,000 to meet their claims (apostles, pp. 204-206; 476; *supra,* p. 4).

If this did not constitute actual payment and satisfaction of libelants' demands, Pacific Motorship Company was, nevertheless, justified in relying upon libelants' acceptance of this assignment and election to look to the freight for payment. Having assured to libelants this means of obtaining payment, the company was under no duty to try to obtain other means by which they could be paid, and should not be penalized because libelants later chose not to realize upon the assignment.

After receiving the assignment on March 17, 1921, libelants did nothing until on April 1, 1921, their proctor was advised that the freight money had been paid to Houlder Weir & Boyd, Inc. (apostles, p. 449) in whose name the contract of affreightment had been made.

Instead of taking any steps to obtain a recognition of his assignment by Houlder, Weir & Boyd, Inc., libelants' proctor sent a telegram to Pacific Motorship Company's representative in Washington (apostles, p. 450) practically charging him with bad faith, these charges being totally unfounded (apostles, pp. 450-451; 457-460; 503-508) and a long letter of expostulation to the Secretary of the Navy (apostles, pp. 465-471) intimating that this result had been obtained "through possible influence, of which I know nothing", and stating that the letter was written merely in order that the incident "may not be repeated", followed by another in similar tone (apostles, pp. 460-463).

Beyond this libelants did absolutely nothing to collect the assigned freight moneys. No demand whatever was made upon Houlder, Weir & Boyd, Inc.

The latter, of course, never made any claim to these freight moneys as its own, but collected them merely for the account of Pacific Motorship Company (apostles, p. 360). The only reason Houlder, Weir & Boyd, Inc., did not remit these funds immediately to the receiver was the existence of the attachment suit brought in New York by Pacific Steam Navigation Company on its claims against Pacific Motorship Company (apostles, p. 360). Neither the receiver nor Pacific Motorship Com-

pany was in a position to claim the freight as against the attaching creditor. The assignment, however, was prior to the attachment, and neither Houlder, Weir & Boyd, Inc., nor the attaching creditor could have had any answer to a claim asserted by libelants under the assignment. No such claim, however, was ever asserted on behalf of libelants.

Having accepted the assignment, libelants were under a duty to their employer to make some effort to realize upon it. They failed to do so, and now ask that their employer be penalized because of this failure.

It is well settled that, even though an assignment has not operated *per se* as payment of the debt of the assignor to the assignee, nevertheless where due diligence is not used in collecting the assigned claim, whereby it is lost, the assignment is deemed payment.

Thus in *Turner v. Rabb,* 4 Mart. (O. S.) 330, a debtor had given his creditor an order for certain cotton "which if paid, is in full". The creditor delayed presenting the order until after the cotton had been destroyed. This delay was held sufficient to discharge the debtor.

See, also:

Briggs v. Parsons, 39 Mich. 400, and
Summers v. Wood, 131 Ark. 345, 198 S. W. 692, citing 30 Cyc. 1191.

The only reason why libelants did not receive the assigned moneys was that they failed to make the necessary demand for them. Whether this was due to mere negligence on their part or to a perverse desire by further delay to enhance the penalties they expected to

recover from the vessel, is quite immaterial. The amount assigned was $12,000, more than twice $5,551.07, the amount of wages due. Libelants by their own fault having failed to realize on the assignment, the debt for wages was discharged and there is no possible basis for a penalty.

(b) There is no Allegation that the Delay in Payment was Without Sufficient Cause.

There is nothing whatever in the libel to show any facts authorizing the imposition of the penalty.

The statute imposes the penalty only where payment is delayed "without sufficient cause".

"Facts showing that the refusal was without sufficient cause" must be pleaded in the libel.

The Express, 129 Fed. 655, 656.

> "The rule obtains as well in admiralty as in other cases that the proof cannot avail a party further than it corresponds with the allegations of the pleadings. In The Rhode Island, 20 Fed. Cas. 648, No. 11,745, it was said:
>
> 'A cardinal principle in admiralty proceedings is that proofs cannot avail a party further than they are in correspondence with the allegations of his pleadings, and that the decree of the court must be in consonance with the pleadings and proofs. Wood, Civ. Law 377; *The Hoppet v. U. S.,* 7 Cranch 389 (3 L. Ed. 380); *Treadwell v. Joseph,* Fed. Cas. No. 14,157; *Jenks v. Lewis,* Fed. Cas. No. 7,280; *The Wm. Harris,* Fed. Cas. No. 17,695. Whatever may be the case then upon the evidence on the one side or the other, the judgment of the court must be restrained and guided by the allegations in issue; and, if they are insufficient to maintain the right of either party as established by the proofs, or the two stand

> in conflict, an amendment must be obtained, or the court will be compelled to pronounce its decision *secundum allegata et probata,* disregarding all evidence not brought within the fair and reasonable scope of the pleadings.' ''
>
> *Second Pool Coal Co. v. People's Coal Co.,* 188 Fed. 892, 895.

See, also,

The Ogeechee, 248 Fed. 803, 807.

In the present case, indeed, the libel, instead of pleading facts authorizing the imposition of the penalty, pleads facts which show that the penalty is utterly inapplicable.

The statute imposes the penalty only for refusal or neglect to pay ''in the manner hereinbefore specified''. And so far as voyages from the Atlantic to the Pacific are concerned, the section in question only specifies that payment shall be made ''within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged whichever happened first''.

As we have seen, the cargo was discharged March 17, 1921, and the wages became due March 18, 1921.

But the libel, filed March 15, 1921, necessarily had to proceed on the theory that the wages had become due, in some other way before that time, and therefore pleaded that libelants ''are no longer bound to continue with the said vessel'' (apostles, p. 15).

Granting, for the moment, that this is true, and that libelants had the right to terminate their employment and declare their wages due prior to the date fixed by the

statute, nevertheless it must follow that, if the wages became due in this way, the statutory penalty cannot be applied.

On libelants' own pleading, therefore, no penalty should have been imposed.

(c) The Effect of the Decree is to Penalize, not the Owners of the Vessel, but Those Having Liens Upon Her.

The statute imposes the penalty upon

> "Every *master* or *owner* who refuses or neglects to make payment," etc.

The *master* is not a party to the present proceeding.

The *equitable owner,* Pacific Motorship Company, is not a party.

The *legal owner,* Anglo-California Trust Company, claimant and appellant, has no beneficial interest in the vessel, and is interested only as trustee.

The decree of the District Court, imposing the penalty not upon the *master* or *owner,* as the statute requires, but upon the *vessel,* which the statute does not authorize, really penalized the *mortgagee* W. E. Gerber, Jr., the intervening libelant and appellant, and also the holders of maritime liens junior to the wage claim but superior to the mortgage, if such claims should aggregate the value of the vessel.

In this circuit, indeed, it has been intimated that this penalty cannot be recovered in a proceeding *in rem* against the vessel, since the statute only creates a personal liability of the master and owner.

The General McPherson, 100 Fed. 860, 864.

The district judge answered this by quoting the language of the statute making the penalty

> "recoverable as wages in any claim made before the court". (Apostles, p. 227.)

Of course this simply means "in any claim made before the court against the master or owner". For this language, relating merely to the *procedural* matter of how the penalty should be enforced cannot be construed as creating new and different *substantive* liabilities.

But even assuming that this language can properly be construed as permitting the recovery of the penalty in a proceeding *in rem,* such recovery can only be permitted when its effect would be to impose the penalty upon the persons designated by the statute as liable for it, the master and owner. Certainly where, as in the present case, there are innocent lienholders to an aggregate greater than the value of the vessel, a decree making the penalty a prior lien on the vessel is not even a substantial compliance with the statute, but actually imposes the penalty upon innocent persons not contemplated by Congress at all.

No authority has been cited that innocent creditors are to be penalized in this way for their debtor's fault.

As we have shown, the employer did not withhold these wages arbitrarily, or oppressively. Its only fault was its financial inability to pay its debts. Extraordinary as the decision of the District Court may seem, that a penalty is due under such circumstances, it becomes doubly so when we consider that this decision

imposes the penalty, not on the employer whose insolvency caused the delay in payment, but on the other creditors. These other creditors, in no way responsible for their debtor's financial reverses, and already suffering on account of their inability to collect their claims in full, are required to pay this penalty to the libelants, who are the only creditors that cannot suffer by the insolvency, since they have a prior lien on the vessel.

No such unreasonable intention can be imputed to Congress.

IV. The amount of the penalty is computed wrongly.

The libelants were hired and paid by the month (apostles, pp. 443-445). In computing the penalty the District Court divided the monthly rates of pay by thirty, to obtain a daily rate. It then determined that between March 17, 1921, and May 17, 1921, there were sixty-one days (since March had 31) and multiplied this figure by twice the daily rate obtained as above. The result is that the court awarded to each man double pay for two months, *plus* one day.

To compute it properly the court should have recognized that the wages were not due until March 18, 1921 (*supra,* p. 30). This makes the period of the penalty up to May 17, 1921, only two months *less* one day.

The decree is, therefore, erroneous in that it awards each libelant four days' pay too much, the total amount of the error being $1,431.98.

The following table shows the details as applied to each man:

Name	Monthly Wage	Daily Wage	Penalty Under Decree	Correct Computation
Richard J. Spencer	222.50	7.42	905.24	875.16
C. V. Miller	193.75	6.46	788.12	762.08
R. H. Councill	170.00	5.67	691.74	668.66
Tim Harrigan	95.00	3.17	386.74	373.66
Franklin Adrean, Jr.	85.00	2.83	345.26	334.34
Frank Garlock	85.00	2.83	345.26	334.34
Birger Johansen	85.00	2.83	345.26	334.34
Fritz Shilling	85.00	2.83	345.26	334.34
Axel Johnsson	85.00	2.83	345.26	334.34
John Lahtimen	85.00	2.83	345.26	334.34
William H. Crawford	318.75	10.63	1,296.86	1,253.74
J. B. Hughes	222.50	7.42	905.24	875.16
Walter S. Austin	193.75	6.46	788.12	762.08
Leon A. Carter	170.00	5.67	691.74	668.66
Campbell A. Hobson	95.00	3.17	386.74	373.66
W. Owens	95.00	3.17	386.74	373.66
W. C. Ward	95.00	3.17	386.74	373.66
N. E. Austin	100.00	3.33	406.26	393.34
Charles V. Smith	75.00	2.50	305.00	295.00
H. D. Wright	135.00	4.50	549.00	531.00
Robert Dougle	115.00	3.83	467.26	452.34
John Lopez	100.00	3.33	406.26	393.34
William Ovid	70.00	2.33	284.26	275.34
S. J. Ryan	70.00	2.33	284.26	275.34
G. Garfield	70.00	2.33	284.26	275.34
D. W. Davis	125.00	4.17	508.74	491.66
Total			13,180.88	11,748.90
Difference				1,431.9

SECOND: LIBELANTS SHOULD HAVE ACCEPTED THE TRANSPORTATION OFFERED BY GERBER AND NOT RECOVERED MONEY IN LIEU THEREOF.

The articles provide for *transportation,* and not *money* in lieu thereof (apostles, pp. 222, 440).

The district judge recognized this, and directed a decree giving transportation, only

"for all such as desire to return to the home port".

(Apostles, p. 228.)

The interlocutory decree is for *transportation*

"for each of the libelants desiring such transportation".

(Apostles, p. 233.)

The final decree, however, is that:

"If said transportation and subsistence are not furnished to said libelants upon satisfaction of the foregoing provisions of this decree that in *lieu thereof* each of said libelants shall receive the *amount* set opposite their respective names, to wit:

Richard J. Spencer	$175.66
C. V. Miller	175.66
R. H. Councill	175.66
Tim Harrigan	168.77
Franklin Adrean, Jr.	168.77
Frank Garlock	168.77
Birger Johansen	168.77
Fritz Shilling	168.77
Axel Johnsson	168.77
John Lahtimen	168.77
Walter S. Austin	175.66
Leon A. Carter	175.66
Campbell A. Hobson	168.77
W. Owens	168.77
W. C. Ward	168.77
N. E. Austin	175.66
Charles V. Smith	168.77
H. D. Wright	175.66
Robert Dougle	168.77
John Lopez	168.77
William Ovid	168.77
S. J. Ryan	168.77
G. Garfield	168.77
D. W. Davis	175.66

"It is further ordered that if any of said libelants shall have furnished their own transportation and

subsistence to said Baltimore, Maryland, prior to payment and/or satisfaction of this decree, that he *shall be paid the sum* last hereinabove set opposite his name in addition to the amounts hereinabove set forth.''

(Apostles, pp. 253-254.)

As so drawn, it postpones our right to furnish *transportation* until libelants shall see fit to satisfy the decree, and gives libelants the right to return to Baltimore, perhaps under employment on another vessel without cost to themselves, and then to recover a *money* judgment for the specific sums set forth.

As it stands it is not clear whether the decree is for *money* or for *transportation* in kind.

Appellant Gerber has tendered the *transportation* in kind. (Apostles, pp. 45, 244.) It is submitted that libelants should have been required to accept this tender and that they should not have a right to a *money* decree on this score.

THIRD: IT WAS IMPROPER TO ENTER A DECREE FOR THE SALE OF THE VESSEL UNDER A JUNIOR LIBEL WITHOUT CONSOLIDATING IT WITH EARLIER LIBELS AND INTERVENING LIBELS UNDER WHICH THE VESSEL IS HELD BY THE MARSHAL, AND WITHOUT NOTICE TO THESE LIBELANTS AND INTERVENING LIBELANTS.

The libel itself sets forth:

''That the said vessel is now in the Bay of San Francisco, and is in charge of a keeper under libels now pending against it in the above entitled court.''

(Apostles, p. 15.)

These libels were in the proceeding numbered 17,116 brought by McIntosh & Seymour Corporation, in which Henry C. Peterson, Incorporated, E. C. Genereaux, and Pacific Steam Navigation Company intervened. (Apostles, p. 270.)

In addition there were No. 17,119, brought by West, Elliot & Gordon (apostles, pp. 286-287), and No. 17,129, brought by R. Jepsen (apostles, p. 291).

These proceedings, as well as that later brought by the master (apostles, pp. 296-297), were all in form *in rem,* with the object of obtaining a decree for a sale of the vessel, free of all claims, to satisfy the causes of action set up by the various parties. No stipulation was ever given for the release of the vessel in any of these proceedings.

It cannot be contended that, while the vessel is in the custody of the marshal under a prior libel *in rem,* a separate proceeding *in rem* may be prosecuted against the same *res.*

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property.

In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, 14 How. 368; Pulliam v. Osborne, 17 How. 471; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Yonley v. Lavender, 21 Wall. 276; People's Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276; Pacific R. R. of Missouri v. Missouri Pacific Railway, 111 U. S. 505; Covell v. Heyman, 111 U. S. 176; Heidritter v. Elizabeth Oil Cloth Company, 112 U. S. 294; Gumbel v. Pitkin, 124 U. S. 131; Johnson v. Christian, 125 U. S. 642; Morgan's Co. v. Texas Central Railway, 137 U. S. 171; Porter v. Sabin, 149 U. S. 473."

Wabash Railroad v. Adelbert College, 208 U. S. 38, 54-55.

"But the extracts quoted from the mortgage and bill show clearly that immediate possession of the property by receivers now, and vendee subsequently, is sought. This cannot be had without displacing that of the present receivers, or making their possession a new one, by appointing them receivers in this cause. That their possession will not be disturbed or changed but by, or by leave of, the court appointing them is, as said in the other case, universal and elementary. No case is cited or known to the contrary.

* * * * * * * *

The substance of the whole is that those who claim the disposition or possession of property in the hands of receivers of a court must come to that court, *in that case,* to reach it, and an independent suit for that purpose cannot be maintained *even in the same court.* Leave of court to file a bill separately must be had *in the original cause,* and this annexes the new bill to that cause, and amounts to the same as filing it in that cause would."

American Loan Co. v. Central Vermont Co., 86 Fed. 390, 392.

Two proceedings *in rem* against the same *res* cannot be maintained concurrently.

It is hardly necessary to suggest the "unseemly conflicts" that would result if a contrary rule prevailed.

After a sale under the decree here appealed from the purchaser would undoubtedly claim immediate possession of the *res,* and the marshal, having made the sale, would be bound to deliver possession. But, under the process in case number 17,116, he had been commanded to attach the same *res* "and to detain the same in your custody." (Apostles, pp. 274, 282.) No order has been made in that case authorizing the release of the vessel,

and the libelant and interveners in that case would undoubtedly insist that he comply with the monitions issued in that case and hold the vessel to meet their claims.

The decree does not direct a sale subject to the claims set up in the other libels, and such a decree would not have been acceptable to libelants, who as seamen claim a prior lien. But the libelant and interveners in case number 17,116 also had liens upon the vessel, and had taken the proper steps to enforce them; the vessel was held under their libels. Surely they could not be deprived of their liens by the proceedings of libelants in this, an independent case of which they had no notice.

Or suppose a decree had been entered and sale made in case number 17,129. Would the purchaser have been entitled to possession as against the claims both of the libelants herein and of the libelant and interveners in case number 17,116? Is the practice of the admiralty court to degenerate into a scramble in which the libelant who gets the first decree has his claim paid, irrespective of the priorities laid down by the decisions?

Or suppose a decree had been rendered and a sale had in the case numbered 17,139, brought by libelants' proctor at the suit of the master (apostles, pp. 296-297), who, by the well-settled rule, had no lien whatever. Could all the other parties, who had taken the necessary steps to perfect their liens, be deprived of their rights by this proceeding, of which they had no notice whatever?

In considering this phase of the case, we must distinguish carefully between instances of successive sep-

arate proceedings *in rem* by different lien claimants, where the vessel has in each case been released on stipulation, and an attempt to institute such separate proceedings where the *res* is still in the possession of the court under the first libel. Where the *res* has been seized and released on stipulation, the proceeding *in rem* becomes essentially a controversy *in personam* between the libelant on one side and the claimant and his sureties on the other; the *res* is no longer in the custody of the court; it would be improper now for another lien claimant to intervene in what is a controversy alien to him; his remedy is to proceed against the *res* by an independent suit *in rem.* But where the *res* is still in the custory of the court, it cannot be seized again, and jurisdiction could not possibly be obtained in a separate proceeding *in rem;* the only remedy is to intervene in the original proceeding.

It must follow, therefore, that if libelants' proceeding in this case is really a separate proceeding *in rem,* in which form the libel was certainly drawn, then it must be dismissed. The libel can only be supported as an intervening libel in case number 17,116, somewhat on the reasoning adopted in receivership proceedings, where similar situations have arisen.

In one of these cases Judge Taft said:

> "It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, pro-

vided it appear, as it does, that it can be maintained as such.''

Continental Trust Co. v. Toledo Co., 82 Fed. 642, 645.

See also

Minot v. Mastin, 95 Fed. 734, 738.

But if this view is to be taken, and the libel here is merely an intervening libel in case number 17,116, then it must follow that the decree appealed from is erroneous because it disposes only of the issues raised by this intervening libel, and leaves still pending, not only the claims filed under case number 17,116, but also those in the cases numbered 17,119 and 17,129, which must also be regarded as mere interventions in case number 17,116. There cannot be several final decrees in what is only one proceeding. Moreover, under no circumstances could the District Court dispose of the issues raised by this libel without affording the other libelants and intervening libelants an opportunity to be heard.

It is true that certain of these parties had some informal notice of the proceedings below. Thus the libelant in case number 17,119 was represented by the same proctor as appellees herein. And the proctors for the libelant and certain of the interveners in case number 17,116, hearing of the decision, were accorded a hearing *after* the District Court had already decided the case. (Apostles, p. 226.) But the libelant in 17,129, and Pacific Steam Navigation Company, one of the interveners in case number 17,116, and the holder of the largest claim, were ignored entirely.

As we have already pointed out, the intervening libelants and other holders of maritime liens are the persons most interested in the decision herein. The effect of the decree is to impose the penalty, not on the master or owner, as required by the statute, but on the other lienholders. Certain of these lienholders had taken the necessary steps to enforce their liens. They were parties to the only proceeding in which a sale of the vessel could rightfully be decreed. Without any notice to them, without giving them an opportunity to present any defense, the District Court has penalized them for no fault of theirs, for no fault of their debtors, even, but simply because their debtor had become insolvent.

It is respectfully submitted that the decree must be reversed.

Dated, San Francisco,
October 5, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX.

In the Southern Division of the United States District Court for the Northern District of California.

First Division. In Admiralty.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, C. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

THE AMERICAN MOTORSHIP "BENOWA", her engines, boilers, tackle, machinery, apparel and furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY (a corporation),

Claimant.

THE COMMONWEALTH OF AUSTRALIA and WILLIAM MORRIS HUGHES, Attorney General of said The Commonwealth of Australia, for said the Commonwealth of Australia,

Intervening Libelant.

(W. E. GERBER, JR.,

Substituted Intervening Libelant.)

No. 17,132

Ira S. Lillick, Proctor for Libelants.

Pillsbury, Madison & Sutro, Proctors for Respondent and Substituted Intervening Libelant, W. E. Gerber, Jr.

Neterer, District Judge.

DECISION.

The libelants on January 21, 1921, signed shipping articles with the master of the Steamship "Benowa" at the Port of Baltimore to ship on a voyage from Port of Baltimore to via one or more coastwise ports to one or more ports on west coast of United States, and final port of discharge on the west coast of the United States, for a period of not exceeding three calendar months, "and if crew is discharged on the west coast, transportation will be paid back to Port of Baltimore, Maryland". The vessel arrived in San Francisco February 28th, and was dicharged March 17th, at the Port of San Francisco. Prior to February 28th, a receiver was appointed for the Pacific Motorship Company, claimant, who qualified on the 28th. On arrival of the vessel there was a scarcity of provisions on the Steamship "Benowa", the claimant being unable apparently to supply the same. The master and crew remained on the ship. The receiver did nothing for the physical care of the ship or for supplying of any provisions. Upon the arrival of the ship in the Port of San Francisco, demand was made upon the master for 50% of the wages earned on the voyage, and was refused by the master, it then not being determined whether discharge would be made at this port and he being unable to pay because of the financial condition of the company. The libel was filed on March 15th. The cargo was discharged March 17th. The master and crew, except two or three, remained on the vessel and discharged the routine duties of the vessel, which was lying at anchor. No provision being furnished, the

men not paid and being without means of support, on the 10th of March, 1921, the following agreement was entered into by the officers and members of the crew with J. R. Wilson, Inc.:

> "We, the undersigned officers and members of the crew of the M/S Benowa, do hereby agree to pay from our subsistence money or wages, a pro rata share of accounts, for stores supplied by the firm of J. & R. Wilson, Inc., to us, on presentation of accounts by said firm, mentioned above, upon payment to us of above subsistence or wages by our attorney, as will be due us from above named vessel.
>
> "We will authorize Mr. Spencer, 1st mate, and Mr. Crawford, chief engr., to check all accounts for us, tho in case of necessity, accounts will be open for inspection by members of the crew."

This being signed by all of the libelants, was endorsed as follows:

> "J. R. Wilson, Inc.: On the above order, I agree to withhold from any payment that may be made me for subsistence of crew and to pay you on approved bills (by Mr. Spencer and Mr. Crawford) the amount that may be due you for provisions so furnished. Ira S. Lillick, attorney for above named crew."

The receiver in his testimony as to what he did states "the only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the "Benowa" was in my hands as receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship". The notice was dictated and sent out on April 1, 1921. No payment was made or tendered to

the officers or crew nor any arrangement made for their subsistence. On the 27th day of April the following tender in writing was filed in this proceeding:

> "Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars ($5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is herewith deposited with the clerk of this court.
>
> "Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.
>
> "Said William E. Gerber, Jr., likewise offers to furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles."

On May 9, 1921, the receiver was discharged and the action dismissed. On May 10th Gerber was substituted as intervenor in place and stead of the Commonwealth of Australia.

It is the contention of the libelants that they are entitled to the wages earned under the shipping articles, less amounts paid, either cash or "slop chest", together with penalty and subsistence to the time of payment, while the intervenor for the claimants contend that the only liability that should obtain is the amount of wages due; that because of the financial condition of the claimant the penalty provided by Section 4529 R. S. as amended, should not apply as "sufficient cause" to avoid the same.

The contention that the libelants are not entitled to their wages to the time of the discharge of the cargo

on March 17th, and the statutory penalty thereafter is not well founded. There is no ground for controversy with respect to the amount due. The provision of the section invoked is:

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seamen a sum equal to one day's pay for each and every day payment is delayed beyond the respective periods, which sums shall be recoverable as wages in any claim made before the court."

The contention that the penalty is a personam liability and may not be impressed as a preferred lien with the wages is likewise out of harmony with the plain sense of the statute, which provides that pay for delay of payment shall be recoverable as *wages in any claim made before the court.* It is in effect an increase of wages on failure of master to promptly pay (Covert v. British Brig Wexford, 3 Fed. 577; The Charles L. Baylis, 25 Fed. 862), and when wages are earned and are due, there is no ground for controversy as to the right to receive payment (The Amazon, 144 Fed. 153). There is agreement in this case as to the amount due for wages, the only contention being that the inability of the claimant to pay because of lack of funds is "sufficient cause" to avoid the penalty. Clearly the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations. It would be manifestly unjust, in some instances inhuman, to discharge a seaman without payment of wages, without means of support, excusing a ship from the plain provisions of the statute

fixing a penalty for default which in no sense was caused by the seamen. An Admiralty Court applies the principles of equity in so far as it may be done, and in this case I think the seamen are entitled to the full amount of their unpaid wage to and including the 17th of March, and to the further sum equal to one day's pay for each and every day from said date until the entry of this decree, and for the amount of the provisions actually necessary and secured for their maintenance upon the vessel, and also for transportation together with subsistence en route for all such as desire to return to the home port. If the parties are unable to agree as to the amount or value of provisions obtained, the case will be referred to the commissioner to take testimony to determine such value.

JEREMIAH NETERER,
Judge.

Filed May 14, 1921.